IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2008

STATE OF TENNESSEE v. BRIAN EDWARD OWEN

Direct Appeal from the Circuit Court for Hickman County
No. 05-5132CR Robert E. Lee Davies, Judge

No. M2007-02069-CCA-R3-CD - Filed April 24, 2008

The Defendant, Brian Edward Owen, pled guilty to two counts of rape of a child, leaving the sentence to be determined by the trial court. The trial court sentenced the Defendant to consecutive eighteen-year sentences. The Defendant appeals the judgments, claiming the trial court's decision to order consecutive sentences violated established Sixth Amendment precedent. After a thorough review of the record and applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Vanessa Pettigrew Bryan, Franklin, Tennessee, for the Appellant, Brian Edward Owen.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; Ronald L. Davis, District Attorney General; Michael J. Fahey, II,, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

At the plea hearing, the State explained that it would have presented the following evidence if the case had gone to trial:

> The proof would have shown, Judge, that the defendant had come to Hickman County – I believe that he'd been most recently in Colorado – to live with his sister, and that his sister had two twin daughters that were under thirteen at the time, and then a son who was younger. As the proof would show that the defendant began befriending, in particular, one of the young girls. She would testify that he told her

things such as she would be a good model, he began by taking photographs of her, and the photographs became increasingly obscene.

Part of the proof would be that after everything came to be, the defendant's camera was recovered that had pictures of this young lady, nude pictures of this young girl. The proof would show that for approximately thirty days at night the defendant would have the little girl come into his bedroom or go into her room, or another room of the house, and would basically have vaginal sex, oral sex, sometimes even anal sex with her over a period of approximately a month.

Specifically, at least as to incidences, the young girl would testify that on one event, on actually the night before – and I guess to give Your Honor an idea of how this came to light, the state would have proof that the defendant flew back to Denver to have a child custody, child support type hearing for a child that he has in Denver, and that when he left to go to Denver, the little girl disclosed to her mother what was going on and that this was the first time that he had been gone from the home for any overnight periods.

That, specifically, on the night before he flew to Denver, the little girl would testify that in his bedroom he had her model and pose for pictures, he removed her clothes, he penetrated her, used his tongue to penetrate her vagina, he put chocolate syrup on her vaginal area, penetrated her, again with his tongue, and then penetrated her with his penis in the vagina. Sometime during the middle of the time that he was there she would testify that on one occasion he was in her bedroom, that he undressed her and kissed her with his tongue in her mouth and that he used lubrication – that was the first time that he had used the lubrication, that's one of the reasons it stood out to the little girl from the other events – that he applied lubrication to her and then he penetrated her with his penis, and on that occasion that he also penetrated her with his finger. The lubrication, the lubricant, at the time the home was searched, was recovered from the defendant's living area in the home.

That on another occasion the little girl would testify that in her bedroom the defendant undressed her and kissed her, this time in her mouth, that on this occasion it was the first time that after he penetrated her with his finger and his tongue, that it was the first time he had penetrated her with his penis, and that's the reason that occasion would stand out to her because that was the first penile penetration.

She would testify that on another occasion that took place in her bedroom he undressed her and that after finger penetration and tongue penetration of her vagina, he attempted – started to put his penis in her mouth, and that was the only time that fellatio was done with the child, and that she didn't want to do that, so he removed his penis from her mouth and then penetrated her again in the vagina.

> She could also specify that the very first time that it happened that it was in her bedroom and that the defendant was hugging on her and kissing on her, penetrated her mouth with his tongue, and then penetrated her vagina with his tongue and his fingers, and that was the very first occasion of any type of penetration.
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> . . . .
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> Also, like I say, a lot of the lubricants and so forth were found, pictures of the little girl were found on his camera, and he gave statements admitting, basically, that there had been this involvement, but that the detectives kind of misunderstood the relationship.
>
> Part of the other case that I think is at least relevant, there were large amounts of pornography, child pornography and so forth, found on his computer. That was the basis of the basis of the separate charge in the other case. The state is *nolling* that, but felt that it was at least relevant to what was going on at the time.

When asked whether the facts were correct, the Defendant responded, "Yes, sir." As a result, the trial court found the Defendant guilty of two counts of rape of a child, a Class A felony.

At the sentencing hearing, the following evidence was presented: Rosemary Owen, the Defendant's sister, testified that she has four children, one of whom is the victim in this case. The Defendant came to live with her after he completed college in Oregon. He assisted Owen with her children in exchange for room and board. During this time, the Defendant was attempting to start an art business from Owen's house. Owen described her two-story house, explaining she and her son lived upstairs, and her three girls lived downstairs. When the Defendant arrived, she put up a curtain downstairs to make a makeshift bedroom.

Owen testified that, prior to his arrest, the Defendant lived with her for about a year. He "knew the rules of the house and was to enforce those rules to make sure that their chores were done and that they didn't do anything that teenagers are [apt] to do and, basically, to help them with their meals and care for them in case they got hurt." Owen explained that the Defendant left for Denver one day, and the victim came to her and asked her to read certain e-mails. The victim told Owen what happened and that the Defendant had taken pictures of her. Owen found the Defendant's digital camera and discovered "graphic" and "seductive" pictures. Owen called the authorities, and the Defendant was arrested when he landed at the Nashville airport. Owen additionally stated that, after the police arrested the Defendant, she discovered pornographic material and a suicide kit in the Defendant's room, "which was a very researched and detailed box of all the ways that you could commit suicide . . . ."

Owen testified that her daughter has nightmares "every night," and "she doesn't enjoy doing anything, soccer, art, anything, she just had no interest in it at all, school." Owen added that the victim thought about suicide, and there were "some cutting incidents." The victim attended

counseling once a week in Nashville for eight months in addition to intensive individual and group counseling at home. The victim additionally suffered from depression since the incidents. Owen also stated the situation was very difficult on her autistic, bipolar son, who "thoroughly trusted" his uncle.

On cross-examination, Owen clarified that the e-mail prompting the search of the house and subsequent arrest of the Defendant was sent by him to the victim. Owen stated she did not know of any specific threats aimed at the victim, but the victim was scared to tell her what happened while the Defendant was around the house. Hence, this is the reason why the victim waited until the Defendant went to Denver to raise the issue. Owen stated that the Defendant initially moved in after college because he had no other options. Additionally, the arrangement worked well for Owen because she was having "issues" with her ex-husband.

Detective Jimmy Barnett testified that he and his partner investigated the allegations against the Defendant. When questioned, the Defendant first stated that the pictures were artistic. When confronted with the victim's specific accusations, the Defendant "didn't really say anything." When asked if he thought the victim was lying, the Defendant responded, "No, [she] is not lying." Detective Barnett testified that he recovered the Defendant's computer, which he sent to the Tennessee Bureau of Investigation (TBI) to be analyzed. The TBI found "over three hundred different things on the computer[, and], by their criteria, one hundred percent fit as child pornography." Detective Barnett reviewed a disc returned to him by the TBI and described the information found on the Defendant's computer as "Adult-on-child, child-on-child" and "children performing sexual acts on animals." Detective Barnett also identified a number of books, pictures, and a tape from a musical group called Ministry found in the Defendant's room. The Ministry tape was titled "The Land of Rape and Honey."

On cross-examination, Detective Barnett admitted he was not familiar with the muscial group Ministry. It could be legitimate music, and many of the books had nothing to do with pornography. Additionally, he found no indication of mutilation or bondage being used with the victim in this case. Detective Barnett also stated that, in his interview, the Defendant contended that the victim encouraged the relationship to the point of requesting the chocolate syrup.

Robert Owen testified that he lives with his wife, his daughter and her four children in Milan, Tennessee. Owen testified that the Defendant, his son, listened to hard rock, including Ministry, and was into art as a young man. He attended art school in Oregon. Owen stated that the Defendant dressed in black in junior high, which caused problems with his teachers. The Defendant also suffered from depression and was treated with medication and counseling. The Defendant had recently considered suicide.

The parties entered a stipulation that stated there is no indication that the Defendant "made threats of harm or anything to this young lady." The Defendant argued that two mitigating factors applied to the Defendant: (1) there was no prior criminal record; and (2) there was no threat of serious bodily injury. *See* T.C.A. § 40-35-113 (1), (13) (2006). The State argued four enhancement

factors applied to the Defendant: (1) the offense involved a victim and was committed to gratify the Defendant's desire for pleasure or excitement; (2) the Defendant abused a position of private trust; (3) the personal injuries were great; and (4) the Defendant had a previous history of criminal behavior. *See* T.C.A. § 40-35-114(1), (6), (7), (14) (2006). The State additionally requested consecutive sentencing based on Tennessee Code Annotated section 40-35-115(b)(5), applicable to defendants convicted of two or more statutory offenses involving sexual abuse of a minor "with consideration of the aggravating circumstances . . . ."

After consideration of the evidence, the trial court found the Defendant was a Range I offender and that the State proved enhancement factors supporting twenty-year sentences. The court also found two mitigating factors, thus reducing the sentences to eighteen years each. In addressing consecutive sentencing, the court stated:

> In this particular case I do find that the defendant has been convicted of two offenses involving sexual abuse of a minor, that in this case the defendant seduced the victim in this case by the use of flattery and photography, telling her she was going to be a model, and as he talked about in his interview, it was a gradual kind of thing that ultimately resulted in the rape of this child on more than one occasion. Again, this occurred while he was supposed to be looking after the welfare of all three children while their mother was working and he was the authority figure, and that this took place over a period of four to six weeks, and that he was discovered only when he left the premises and his influence over these children or this child was removed, and then as soon as that occurred they told their mother what happened.
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> I did listen to the testimony of their mother and I read the letter of the victim, and it is clear to me that [the victim] is continuing to suffer, unfortunately, from some type of attempt to take her life in the past, she has withdrawn from people, from her normal, daily activity, she's become a withdrawn person, she suffers from nightmares, she suffers from insomnia. And clearly from the letter that she wrote to – I believe it really was to God, it might've been given to me, but it was not written to me, but her faith is clearly shaken, and that's a disturbing thing for her, if you read that letter. And, so, I sense that whatever moorings she had, whatever foundation she had, has been cut loose and she's adrift out there, and that's a scary thing for a fourteen-year-old, twelve-year-old, whatever.
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> On the other hand, I did read the statement from the defendant, and I do have to concur with the state in some respects, that there is an underlying tone in the letter that "It was not my fault," it was "We did something," "We did this," and "We did that," and never a real acknowledgment from the defendant that "I am solely responsible for what took place," for what I believe was a calculated seduction of a child.
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> Therefore, I run these sentences consecutively, two consecutive eighteen-year

sentences.

It is from this judgment that the defendant now appeals.

II. Analysis

On appeal, the Defendant only challenges the trial court's decision to order consecutive sentences pursuant to Tennessee Code Annotated section 40-35-115(b)(5). When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

The crimes in this case occurred between July 2005 and September 2005, after the effective date of the amended sentencing statutes, and the Defendant was sentenced under the amended statute. *See* T.C.A. § 40-35-114 (2006), Compiler's Notes. For this reason, the Defendant does not argue, under *Blakely* and *Gomez*, that his sentences for each conviction were enhanced in an unconstitutional manner. Instead, the Defendant challenges the trial court's determination that the Defendant fell under one of the statutorily enumerated criteria for a permissible consecutive sentence. *See* T.C.A. § 40-35-116(b)(5) (2006). That statute states the following:

> (a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively as provided by the criteria in this section.
> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
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> > . . . .
> > (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> > . . . .
>
> (d) Sentences shall be ordered to run concurrently, if the criteria noted in subsection

(b) are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure.

Id. The question the Defendant raises is whether the consecutive sentencing statutory scheme violates his Sixth Amendment rights to trial by a jury.

The United States Supreme Court concluded that, in certain instances, fact-finding by a judge may violate a defendant's right to a jury trial if the fact-finding subjects the defendant to increased punishment that would not be allowed but for the fact-finding. *See, e.g.*, *Cunningham v. California*, 127 S. Ct. 856, 864-65 (2007); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."). To date, the United States Supreme Court and Tennessee Supreme Court have only applied this rule to a trial court's determination on enhancing factors. *See State v. Gomez*, 239 S.W.3d 733, 738-41 (Tenn. 2007). This Court has similarly only applied this rule to enhancement factors. *See, e.g., State v. William Shane Bright*, No. E2006-01906-CCA-R3-CD, 2007 WL 1259176, at *2 n.1 (Tenn. Crim. App., at Knoxville, Apr. 30, 2007) (noting Tennessee courts have consistently held that the consecutive sentencing scheme does not violate the Sixth Amendment); *State v. Hezekiah Cooper*, No. W2005-02481-CCA-R3-CD, 2007 WL 4462991, at *16 n.4 (Tenn. Crim. App., at Jackson, Dec. 20, 2007) (same), *Tenn. R. App. P. 11 application dismissed* (Tenn. Mar. 24, 2008).

The crux of the argument for the Defendant is that the *Apprendi* - *Blakely* - *Cunningham* rule should apply not only to the determination of an appropriate sentence for a particular conviction, but also to the determination of whether multiple sentences should be served concurrently or consecutively. This argument has been analyzed and accepted by Oregon and Ohio but rejected by the majority of other courts that have considered the issue. *See Oregon v. Ice*, 170 P.3d 1049, 1058 (Or. 2007); *Ohio v. Foster*, 845 N.E.2d 470, 490-91 (Ohio 2006), *cert denied* , — U.S. —, 127 S. Ct. 442 (2006). *But see California v. Black*, 161 P.3d 1130, 1145 (Cal. 2007) (rejecting interpretation as it applies to consecutive sentencing); *Gould v. Wyoming*, 151 P.3d 261, 268 (Wy. 2006) (same); *Hawai'i v. Kahapea*, 141 P.3d 440, 453 (2006) (same); *Smylie v. Indiana*, 823 N.E.2d 679, 686 (Ind. 2005) (same), *cert. denied*, 546 U.S. 976 (2005); *Washington v. Cubias*, 120 P.3d 929, 932 (Wash. 2005) (same); *Illinois v. Wagener*, 752 N.E.2d 430, 441 (Ill. 2001) (same), *cert. denied*, *Wagener v. Illinois*, 534 U.S. 1011 (2001). Our Supreme Court, on the other hand, has not addressed this issue post-*Gomez*. The language of the statute in issue, however, has not been amended since this issue was addressed in a footnote *in State v. Robinson*, 146 S.W.3d 469 (Tenn. 2004). In *Robinson*, the Court noted "that several courts have rejected the defendant's contention and held that *Blakely* and *Apprendi* do not apply to the decision to impose consecutive sentences." *Id*. at 499 n.14. This Court, in squarely addressing this issue, has concluded that the Sixth Amendment is not violated by consecutive sentencing after fact-finding by a trial court. *Cooper*, 2007 WL 4462991, at *16 n.4; *Bright*, 2007 WL 1259176, at *2 n.1; *State v. Earice Roberts,* No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *12 (Tenn. Crim. App., Jackson, Nov. 23, 2004), *perm. to appeal denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce,* No. M2003-01924-CCA-R3-CD,

2004 WL 2533794, at *13-14 (Tenn. Crim. App., Nashville, Nov. 9, 2004), *perm. to appeal denied* (Tenn. Feb. 28 2005).

Tennessee case law is clear that the Defendant is not presently entitled to relief on this issue.[1] Having reviewed the record, we conclude that the trial court did not err in ordering the Defendant's sentences to be served consecutively and that the length of the Defendant's sentences are "justly deserved in relation to the seriousness of the offense[s]" and are "no greater than that deserved for the offense[s] committed." T.C.A. § 40-35-102(a). The trial court's findings of fact and conclusions of law with regard to Tennessee Code Annotated section 40-35-116(b)(5) are supported by substantial evidence in the record.

III. Conclusion

Based on our review of the record, we conclude the trial court did not err in ordering the Defendant's sentences to be served consecutively. The judgments of the trial court are affirmed.

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ROBERT W. WEDEMEYER, JUDGE

[1]The Tennessee Supreme Court has accepted Rule 11 applications on three cases that raised this issue in this Court. *See State v. Phedrek T. Davis*, No. M2006-00198-CCA-R3-CD, 2007 WL 2051446 (Tenn. Crim. App., at Nashville, July 19, 2007), *perm. app. granted* (Tenn. Dec. 17, 2007); *State v. Anthony Allen*, No. W2006-01080-CCA-R3-CD, 2007 WL 1836175 (Tenn. Crim. App., at Jackson, June 25, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007); *State v. Eric Lumpkins*, No. W2005-02805-CCA-R3-CD, 2007 WL 1651881 (Tenn. Crim. App., at Jackson, June 7, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007).